From Nuremburg to Kosovo: The Morality of Illegal International Legal Reform*

Allen Buchanan

I. THE PROBLEM OF ILLEGAL REFORM

Optimism about practice and in theory.—Most would agree that the international legal system has undergone significant moral improvement since 1945. The veil of sovereignty has been pierced: a burgeoning human rights law affirms that how a state treats its own population is no longer its own business only. Slavery, genocide, and aggressive war are prohibited. More states than ever before are democratic. Some scholars even argue that international law is moving toward recognition of a right to democratic governance as a human right.[1] The prodemocracy intervention in Haiti, the expulsion of Iraqi forces from Kuwait, and the NATO intervention in Kosovo have all been praised as valuable steps toward an international system that takes as primary the protection of the rights of individuals rather than the interests of states. Widely discussed goals for further improvement include better compliance with human rights norms; a more consistent, effective, and morally defensible international legal response to secession and other self-determination conflicts; more effective support for democracy; impartial and effective procedures for the prosecution of war crimes; and greater equality among states as actors in the creation and application of international law. The spate of normative writings on secession, self-determination, humani-

* I am indebted to David Miller, Benedict Kingsbury, and an anonymous reviewer at *Ethics* for their astute and constructive comments on an earlier version of this article. I also thank Alex Aleinikoff, David Luban, Jane Stromseth, and other members of the legal theory workshop at the Georgetown University Law Center for their extremely helpful and generous comments on an earlier version of this article. I am also grateful to Alexsander Jovic, Courtney Campbell, Angelo Corlett, Michael Phillips, and Anthony Ellis for their insightful comments on a version of this article presented at a conference on humanitarian intervention at Portland State University (October 2000). Kristen Hessler and Avery Kolers also provided valuable comments on an early draft.

1. Thomas Franck, "The Emerging Right to Democratic Governance," *American Journal of International Law* 86 (1992): 46–91.

Ethics 111 (July 2001): 673–705
 0014-1704/2001/11104-0001
$02.00

tarian intervention, and on the hypothesis that democratic states do not make war on one another indicates both approval for progress already achieved and the expectation of more progress to come.[2]

Lawlessness in the name of progress.—Yet what some hail as progress others decry as illegal acts that threaten the rule of law, betray a lack of sincerity regarding fidelity to law, and manifest a disturbing willingness to impose subjective, personal moral standards on others. To take only two prominent examples, international legal scholars J. S. Watson and Alfred Rubin condemn humanitarian intervention and attempts to enforce human rights norms through the operation of international war crimes tribunals as illegal acts parading under the guise of legality.[3] In addition, they suggest that the source of the illegal reformist's error may lie in his willingness to impose his own subjective view of what morality requires upon others. Such allegations raise a fundamental issue of much greater generality and import than debates over the legal status or the desirability of any particular change in the international legal rules: under what conditions, if any, is it morally justifiable to engage in acts that violate existing international law in order to bring about supposed moral improvements in the system of international law?

Distinguishing illegal acts of legal reform from mere conscientious lawbreaking.—Notice that this question is not the same as "Under what conditions, if any, is it morally justifiable to violate international law?" The case of NATO intervention in Kosovo illustrates the distinction. The chief justification U.S. and NATO officials gave for the intervention was that it was necessary to prevent a humanitarian disaster—to stop the massive human rights violations perpetrated by Serbs upon Kosovar Albanians. It appears that the preponderance of international legal opinion is that the intervention was illegal, and it is revealing that U.S. State Department officials were told to avoid the issue of legality in their public statements, presumably because it would be impossible to make a convincing case that the intervention was legal.

In addition to this chief justification, there was the suggestion, on the part of some leaders, including U.S. Secretary of State Madeleine Albright, that the NATO intervention was a first important step toward establishing a new customary norm of international law, according to which humanitarian intervention can be permissible without Security Council authorization. According to this second line of justification, vio-

2. For a valuable critical exposition of the different ways of formulating the democratic peace hypothesis, the evidence for it, and the criticisms of it, see Bruce Russett, *Grasping the Democratic Peace: Principles for a Post–Cold War World* (Princeton, N.J.: Princeton University Press, 1993).

3. J. S. Watson, "A Realistic Jurisprudence of International Law," *The Yearbook of World Affairs* (London: London Institute of World Affairs, 1980), pp. 265–85; Alfred P. Rubin, *Ethics and Authority in International Law* (Cambridge: Cambridge University Press, 1997), esp. pp. 70–206.

lating existing law was justified to initiate an improvement in the international legal system.

The chief justification presents the illegal action as a necessary exception to law-abidingness in the name of justice, without in anyway implying that the system as a whole, or even the particular rule that is violated, is in need of improvement. Employing this justification is fully consistent with believing that the existing rule that requires Security Council authorization for humanitarian intervention is a good rule, even that it is the best rule possible. The second justification is quite different: it justifies the illegal intervention as an act directed toward reforming the system. Its implication is that the existing rule requiring Security Council authorization is not optimal, and that a new norm of humanitarian intervention, according to which Security Council authorization is not needed, is morally preferable.

There is a further difference: an agent who invokes the first justification need not have any commitment to the rule of law; he might, for example, be an anarchist. In contrast, a person who breaks the law with the aim of improving the legal system thereby shows that he values the contribution that a system of law can make to justice. So illegal acts directed toward legal reform are of special interest because, on the one hand, they seem more respectable by virtue of being directed toward improving the system (unlike acts that evidence a total disregard for the rule of law) while, on the other hand, they raise the question of how those who are committed to the rule of law can be willing to break the law. Because my concern in this article is with the justification of illegal acts directed toward the moral improvement of the international legal system, not with the question of when it is morally justifiable to break the law, I will not canvass the voluminous literature on the obligation to obey the law (which has focused on domestic law) and then try to determine to what extent its results apply to the case of international law.

Answering the question of when, if ever, illegal acts directed toward improving the international legal system are morally justified is a contribution to the nonideal moral theory of international law. Ideal theory prescribes and justifies the most fundamental principles that an international legal order ought to satisfy. Nonideal theory includes two parts: principles for dealing with noncompliance with the prescriptions of ideal theory and principles for determining the morally accessible ways of making the transition from our nonideal state to a satisfaction of the ideal theory's prescriptions. It is the second part of nonideal theory that includes our question.

Distinguishing illegal acts of international legal reform from the standard case of civil disobedience.—At this point one might well ask: why restrict the question to *international* law? As the considerable normative literature on civil disobedience shows, the morality of illegal acts for the sake of improving a legal system is hardly a new topic and has been explored thor-

oughly in regard to domestic legal systems. (For example, Dr. Martin Luther King, Jr., broke state segregation laws to stimulate legislators and the courts to eliminate them and thus make the system of law more just.) Nevertheless, for three reasons the question has particular bite in the case of international law.

First, the illegal acts that are most likely to contribute to the moral improvement of the international legal system differ markedly from acts of civil disobedience, at least when the latter are most clearly morally justifiable. From the standpoint of moral justification, the least problematic case of civil disobedience is that in which the lawbreaker violates the law openly and accepts the predictable legal penalty for her act, thus showing respect for law at the same time she violates a particular law. But as I shall elaborate below, in the typical case illegal acts directed toward reform of the international legal system are perpetrated by actors who will not be subject to legal penalty, not simply because the international legal system is weak in enforcement capacity but because the lawbreaker will tend to be a powerful state or coalition against whom punitive action is not likely to be taken.[4]

Second, and more important, compared to the better specimens of developed legal systems, the international legal system is both more in need of improvement and less endowed with resources for relatively expeditious lawful improvement. Therefore the question of the morality of illegal acts directed toward system reform is likely to be more acute and to arise more frequently in the international case.

Third, the illegal acts we are concerned with are not committed by private individuals or groups of private individuals as in the case of civil disobedience; they are state actions and this raises the stakes of the decision to act illegally. Illegal acts committed by states are, other things being equal, more of a threat to the perceived legitimacy of the system than those committed by private individuals.

The sort of illegal reformist act I shall focus on is exemplified by the NATO action in Kosovo: an illegal act of humanitarian intervention, justified as a contribution toward making the international legal system better from a moral point of view. However, the fundamental question this article addresses is both wider and narrower than that of the justification of humanitarian intervention: wider, because although the examples I discuss are illegal acts of humanitarian intervention my broader concern is with the more general class of illegal acts directed toward legal reform; narrower, because it is only illegal acts *directed toward legal reform* that I explore and not all acts of humanitarian intervention fit this description.[5]

4. There may, however, be domestic legal and/or political repercussions.

5. As an example of an illegal act directed toward reform that is not an act of intervention, consider the United States's unilateral declaration in 1976 of a prohibition against using fishing nets that are dangerous to dolphins in a 200-mile zone (far exceeding its

Limited resources for lawful moral improvement.—The ways in which international law can be made significantly limit the options for lawful reform of the system. There are two chief sources of international law: treaty and custom. If the target of moral improvement is to prohibit a form of behavior engaged in by more than a few states or to create a new norm that allows behavior that previously would have been a violation of the rights of sovereignty that all states enjoy, reform by treaty may be a very slow process at best. Suppose that the goal of reform is to establish a norm of international law that not only requires states to "promote" human rights within their own borders and to supply periodic reports on their progress in doing so to some international body (as the major human rights covenants stipulate), but that also authorizes armed intervention to halt massive human rights violations that occur in domestic conflicts when less intrusive means have failed. Many states will refuse to sign such a treaty. Others may sign but postpone ratification indefinitely. Others may sign and ratify, but weaken the force of the document by stating "reservations" regarding some clauses (thereby exempting themselves from their requirements) or by stating "understandings" which interpret burdensome clauses in ways that make them less threatening to state interests.

As an avenue for moral improvements that are both significant and timely, the process by which international customary law is formed is hardly more promising. In briefest terms, new norms of customary law are created as the result of the emergence of a persistent pattern of behavior by states, accompanied by the belief that the behavior in question is legally required or authorized (the *opinio juris* condition). However, there are several aspects of this process that significantly limit the efficacy of the customary route toward system improvement. First, international law allows states to opt out of the new customary norm's scope by consistently dissenting from them. Second, how widespread the new pattern of state behavior must be before a new norm can be said to have "crystallized" is not only disputed but probably not capable of a definitive answer. Third, even if a sufficiently widespread and persisting pattern of behavior is established, the satisfaction of the *opinio juris* condition may be less clear and more subject to dispute. Pronouncements by state leaders may be ambiguous or mixed, in some cases indicating a recognition of the behavior in question is legally required or authorized, in other cases appearing to deny it.

Given these limitations, the efforts of the state or states that first attempt to initiate the process of customary change are fraught with uncertainty. If the new norm they seek to establish addresses a long-stand-

---

territorial waters). The morality of such illegal acts directed to reform on international law in the name of protecting species or environmental protection is an important topic that merits a separate treatment.

ing and widespread pattern of state behavior, and one in which many states profess to be legally entitled to persist, other states may not follow suit. Or, if other states follow suit, they may do so for strictly pragmatic reasons and may attempt to ensure that a new customary rule does not emerge by officially registering that they do not regard their behavior as legally required (thus thwarting satisfaction of the *opinio juris* condition).

The crucial point is that new customary norms do not emerge from a single action or even from a persistent pattern of action by one state or a small group of states. Thus the initial effort to create a new customary norm is a gamble. A new norm is created only when the initial behavior is repeated consistently by a preponderance of states over a considerable period of time and only when there is a shift in the legal consciousness of all or most states as to what the law is. At any point the process can break down. For example, if one powerful state dissents from an emerging norm, other states may decide that it is prudent to register dissent as well or to refrain from pronouncements that would otherwise count as evidence for satisfaction of the *opinio juris* requirement. For all of these reasons, significant and timely reform through the creation of new customary norms of international law is difficult and uncertain.

That reliance on change through the establishment of new custom is a formidable obstacle to fundamental social change has long been recognized. All of the great proponents of the modern state—the state with legislative sovereignty—from Bodin and Hobbes to Rousseau, recognized the severe limitations that adherence to the evolution of customary law imposed on the possibilities for reform. Only the power to issue and enforce rules that can overturn even the most deeply entrenched customary norms in domestic society would suffice; thus the insistence on legislative sovereignty. But in the international legal system there is as yet nothing approaching a universal legislature. Nor is there a process of constitutional amendment. To summarize: heavy reliance on customary law, absence of both a universal legislature capable of overturning custom and a constitutional amendment process, and the obvious limitations of the treaty process together result in a system in which lawful reform is more difficult than in developed domestic systems.[6]

Although they are quite different mechanisms for the creation of international law, treaty and custom have this in common: they both rely heavily on states' acceptance of norms as binding. Indeed, the idea that state consent (whether explicit, as in the case of treaties, or tacit, as with

6. The foregoing picture of international law's limited resources for lawful moral reform is, of course, a sketch in broad strokes. There are more subtle modes by which international law can be changed. For example, judicial bodies (such as the International Court of Justice) or quasi-judicial bodies (such as the UN Human Rights Committee) can achieve reforms under the guise of interpreting existing law. However, as a broad generalization it is fair to say that these modes for effecting moral improvements are both limited and slow.

custom) is essential is the predominant view of what is distinctive of international law. There are well-known difficulties in the idea that customary norms enjoy the consent of all states (in particular, not opting out cannot properly be regarded as tacitly consenting), and there is also the problem that international law counts as consensual agreements that are far from voluntary on the part of one party (peace treaties signed under duress by the losers in war are said to be consented to by them). Nevertheless, there is a substantial kernel of truth in the assertion that the system exists through state consent: the mechanisms of treaty and custom result in a system in which it is extremely difficult for anyone to impose norms that the majority of states oppose.

This broadly consensual nature of international law undoubtedly brings some benefits. For example, it may make it more difficult for a hegemon to hijack the international legal system for its own purposes. Nonetheless, what might be loosely called the state consent supernorm comes at a steep price: it makes timely moral reform difficult in a system which few would deny needs improvement.

Illegal acts directed toward system reform: Three examples.—To clarify what is at stake in the issue of the morality of illegal legal reform, consider the following hypothetical cases.

> *Case 1.*—Bowing to sustained international pressure, Iraq agrees to grant autonomy (limited self-government, not full independence) to the Kurdish people in its northern region. But as with its 1970 autonomy regime for the Kurds, Iraq violates the agreement. A multinational force "endorsed" by a UN General Assembly Resolution but not empowered by a decision of the Security Council intervenes to restore the Kurds' autonomy and to create a monitoring mechanism to provide early warning if Iraq seeks to violate the autonomy arrangement in the future.
>
> *Case 2.*—A new genocide erupts in Burundi. A coalition of French and American forces quickly intervenes, disarms the perpetrators of genocide, arrests the leaders of the genocide, and turns them over to an international genocide tribunal. Neither the Secretary General of the UN, nor the Security Council, nor the General Assembly endorse this intervention, but they do not condemn it either.
>
> *Case 3.*—A small Latin American country has just achieved its first truly democratic election. But then a group of fascist colonels in its armed forces overthrows the newly elected government by force and "permanently abolishes" democracy. A coalition of key members of the Organization of American States intervenes militarily and restores the elected government.

Were these events to occur there is little doubt that many members of the general public and perhaps a majority of international legal theorists would view at least some of them favorably, as contributions toward a more morally sound international order in which human rights and

democracy are better protected than at present. No doubt some theorists would portray these events as the first hopeful steps toward establishing new, more morally enlightened norms of international customary law. They would hope that these types of actions would be repeated and that eventually new norms would crystallize.

Permissive versus obligatory norms.—These examples indicate another feature of the process of customary norm creation. The same type of behavior (e.g., intervention to prevent genocide, as in case 2) might exemplify the content of either a permissive or an obligatory norm of intervention. In the former case, the new customary norm would be established only after the emergence of a sustained pattern of intervention, accompanied by the belief that the intervention was legally permissible under international law; in the latter, only if the pattern of behavior were accompanied by the belief that intervening is obligatory. Presumably, as a broad generalization the establishment of a new permissive customary norm should be less difficult, to the extent that it does not impose affirmative duties on states but only increases the scope of their lawful discretionary action and in that sense does not represent a radical change in a system that has traditionally left much to the decisions of states. However, this generalization is subject to an important exception: if the new permissive norm in effect cancels a preexisting prohibition against nonconsensual action toward other states, as is the case with a permissive norm of humanitarian intervention, then it represents a very significant change and one which states may resist.

Avoiding the "What is law?" question.—My aim in articulating the three examples above is not to take a firm position on the question of whether any particular effort to improve the international legal system is illegal. I believe that it is relatively uncontroversial that in at least some of the three cases, if not all three, the act in question would be deemed uncontroversial by the preponderance of experts in international law. The choice of particular examples is not important, however. The key point is this: given the relatively undeveloped state of international law—in particular, its inadequate protection of basic human rights and its limited resources for timely and lawful change in the direction of more adequate protection—there are opportunities for acts which are both illegal and highly desirable as steps toward morally improving the system. To raise the question of the morality of illegal international legal reform, we need not agree on a definitive and comprehensive solution to the hoary question, 'What is international law?' or 'When is a norm an international law?'

Facing the question of illegal acts of reform squarely.—Critics such as Watson and Rubin are right to suggest that too often those who endorse what they regard as acts of reform evade the question of whether illegal acts are morally justifiable by assuming, without good reason, that the acts in

question are not really illegal.[7] Without resolving complex debates about what the law is, I wish to confront head-on the question of whether and if so under what conditions illegal acts of reform are morally justified.

Some of the most important moral improvements in the international legal system have resulted, at least in part, from illegal acts. Consider one of the great landmarks of reform: the outlawing of genocide. To a large extent this was an achievement of the Nuremburg War Crimes Tribunal (though at the time the term 'genocide' was not part of the legal lexicon). However, a strong case has been made by a number of respected commentators that the "Victors' Justice" at Nuremburg was illegal under existing international law. In particular, it has been argued that there was no customary norm or treaty prohibiting what the Tribunal called "crimes against humanity" at the time World War II occurred. But quite apart from this it has been argued that even if (contrary to what some commentators say) aggressive war was prohibited at the time the Second World War began, there was no international law authorizing the criminal prosecution of individuals for waging or conspiring to wage aggressive war.

There is no denying that the Nuremburg Tribunal contributed to some of the changes in international law that we regard as the epitome of progress—not just the prohibitions of genocide and aggressive war but also the international recognition of the rights of human subjects of medical experimentation.[8] Nonetheless, it can be argued that at least some of the punishments meted out at Nuremburg were illegal.

It can also be argued that a series of illegal actions over several decades played a significant role in one of the other most admirable improvements in the international legal system: the prohibition of slavery. In the late eighteenth and early nineteenth centuries Britain used the unrivaled power of its navy to attack the transatlantic slave trade.[9] Britain's strategy included illegal searches and seizures of ships flying under

7. Watson, pp. 271–72; Rubin, p. 124.

8. The Nuremburg Code, which prohibits experimentation on human subjects without consent, was drafted as a direct result of the prosecution of the Nazi doctors for their inhumane experiments on unwilling human subjects. See German Territory under Allied Occupation, 1945–1955: U.S. Zone, Control Council No. 10, *Trials of War Criminals before the Nuremberg Military Tribunals* (Washington, D.C.: U.S. Government Printing Office, 1949), vol. 2, pp. 181–82; William J. Bosch, *Judgment on Nuremburg: American Attitudes toward the Major German War-Crimes Trials* (Chapel Hill: University of North Carolina Press, 1970).

9. Rubin, pp. 97–130; Reginald Coupland, *The British Anti-Slavery Movement* (London: Oxford University Press, 1993), pp. 151–88. Note that in adducing this example, I am not assuming that the motives of the British government were pure, only that one justification for the forcible disruption of the transatlantic slave trade that could have been given was that these illegal actions would contribute toward a moral improvement in the international legal system. Whether those who instigated the policy of disrupting the transatlantic slave trade were motivated by humanitarian concerns or not is irrelevant.

other nations' flags, as well as attempts to get other countries to enforce their own laws against commerce in human beings. It is highly probable that what success Britain had in persuading other states to cooperate in efforts to destroy the slave trade was due in part to its willingness to use illegal force. The destruction of the slave trade was a milestone in the development of a growing human rights movement that eventually issued in the international legal prohibition of slavery, but which also expanded to include other human rights.

Once the pivotal role of such illegal acts is acknowledged, it is unconvincing to appeal to the moral progress that has already been achieved in international law to support the assumption that significant continued progress will be achieved with reasonable speed and without illegality. On the contrary, given the system's limited resources for lawful change—and the fact that it is still a state-dominated system in which many of the most serious defects calling for reform lie in the behavior of states—the question of the morality of illegal reform is inescapable.

II. THE CONDEMNATION OF ILLEGAL REFORM EFFORTS

Two issues: Fidelity to law and moral authority.—We can now proceed to evaluate the position of those, such as Watson and Rubin, who condemn what they take to be illegal acts done in the name of the moral improvement of the international legal system. Such critics raise an issue that is as fundamental as it is neglected: under what conditions, if any, is it morally justifiable to breach international law in order to try to improve the system from a moral point of view? To answer this question, I shall argue, we must answer two others: (1) what is the moral basis of the commitment to bringing international relations under the rule of law? and (2) under what conditions, if any, can an agent's judgments about what justice requires count as good reasons for imposing rules on others? In order to answer question 1, we need an account of *fidelity to law* that enables us to determine how the would-be reformer should weigh the fact that his proposed action of reform is illegal. In order to answer question 2, we need an account of *moral authority* (or what Rawls calls legitimacy) that enables us to determine if the would-be reformer is justified in imposing on others a norm to which they have not consented and which some would reject. A satisfactory answer to the first question is needed to counter the charge that advocates of illegal acts directed toward system reform show lack of due respect for law while purporting to improve it. A satisfactory answer to the second question is needed to refute the allegation that advocates of illegal acts directed toward system reform are wrongly seeking to impose their own "subjective" moral views on others. I address the issue of fidelity to law in the remainder of this section; in Section IV, I address the issue of moral authority.

Unfortunately, critics like Watson and Rubin have done a better job of raising the issue of the morality of illegal legal reform than of resolving

it. It is fair to say that both authors assume, more than argue, that illegalities in the name of system reform are not morally justified. At the very least, the exact character of their complaint is not clear. It is possible to begin the task of appreciating the condemnation of illegal acts of reform by reconstructing a simple argument on their behalf. Call it the Fidelity Argument. It purports to explain why the fact that the reformist's act is illegal counts decisively against the morality of the act.

1. One ought to be committed to the rule of law in international relations.
2. If one is committed to the rule of law in international relations, then one cannot consistently advocate (what one recognizes to be) illegal acts as a means of morally improving the system of international law.
3. Therefore, one ought not to advocate illegal acts as a means of morally improving the system of international law.

III. BASES FOR FIDELITY TO LAW

The first step is to clarify the phrase 'the rule of law' in the argument in order to understand just why honoring the commitment to the rule of law is important. There are in fact two quite different ways in which critics of illegal reform may be understanding 'the rule of law' in the Fidelity Argument. According to the first, 'the rule of law' refers to a normatively rich ideal for systems of rules. According to the second, 'the rule of law' means something that may be much less normatively demanding, namely, a system of rules capable of preventing a Hobbesian condition of violent chaos. Let us see how the Fidelity Argument reads under these two interpretations.

Fidelity to the ideal of law.—According to the first interpretation, the rule of law is an ideal composed of several elements: laws are to be general, public, not subject to frequent or arbitrary changes, and their requirements must be reasonably clear and such that human beings of normal capacities are able to comply with them.[10] These requirements help ensure that a system of law provides a stable framework of expectations, so that individuals can plan their projects with some confidence and coordinate their behavior with that of others. But there is another element of the rule of law as a normative ideal which on some accounts is of single importance: the requirement of equality before the law. The precise import of this requirement is, of course, subject to much dispute, but the core idea is that the law is to be applied and enforced impartially.

If we read 'the rule of law' in the Fidelity Argument as referring to this normatively demanding ideal, as including the requirement of equality before the law, then the argument is subject to a serious and

10. Lon L. Fuller, *The Morality of Law* (New Haven, Conn.: Yale University Press, 1964), pp. 33–39.

obvious objection. The difficulty is that the international legal system falls short of the requirement of equality before the law. The most powerful states (such as China, the United States, and the Russian Federation) not only play an arbitrarily disproportionate role in the processes by which international law is made and applied but also are often able to violate the law with impunity.

According to the first interpretation of the Fidelity Argument, it is our moral allegiance to the rule of law as a normative ideal that is supposed to be inconsistent with advocating or committing what we believe to be illegal acts even if they are directed toward reforming the system. But to the extent that the existing system falls far short of the ideal of the rule of law in one of its most fundamental elements, the requirement of equality before the law, allegiance to the ideal exerts less moral pull toward strict fidelity to the rules of the existing system. Indeed, allegiance to the rule of law as an ideal might be thought to make illegal acts *morally obligatory* in a system that does a very poor job of approximating the requirements of the ideal. More specifically, a sincere commitment to the rule of law might be a powerful reason for committing illegal acts directed toward bringing the system closer to fulfillment of the requirement of equality before the law, if there is no lawful way to achieve this reform.[11] The point is that one cannot move directly from the commitment to the rule of law as an ideal to strict fidelity to existing law. Whether a commitment to the rule of law as an ideal precludes illegal reform actions will depend in part upon the extent to which the existing system approximates the ideal.

Notice also that the critics' second complaint has little force against illegal acts of reform directed toward making the system better satisfy the requirements of the ideal of the rule of law, especially that of equality before the law. To say that the core accepted elements of the rule of law are merely the personal moral views of the reformers, and that it would therefore be illegitimate to impose them on others, would be extremely inaccurate. Not only are they widely accepted, but unless they are assumed to be highly desirable it is hard to make sense of the idea of fidelity to the law as a moral ideal. In the next subsection we will see that the illegitimacy issue—the question of when an agent is morally justified

11. The problem of achieving greater equality among states is a complex one. One cannot assume that the best or only way to achieve greater equality is by greater democratic participation in the making and application of international law. One alternative would be a system of constitutional checks on actions of more powerful states. For example, international norms specifying when humanitarian intervention is justified might be crafted to reduce the risk that powerful states would abuse them, by requiring very high thresholds of human rights abuses before intervention was permitted, and by requiring international monitoring of the process of intervention to facilitate ex post evaluation of whether the requirement of proportionality was met, etc. I am indebted to T. Alexander Aleinikoff and David Luban for emphasizing this point (personal communications).

in imposing moral standards on those who do not accept them—has more bite when the moral principles motivating illegal acts of reform are more controversial.

Substantive justice.—There is another reason why a simple appeal to the ideal of the rule of law cannot show that illegal reform acts are not morally justifiable: the extent to which a system of rules exemplifies the ideal of the rule of law is not the only factor that determines the moral pull toward compliance. Approximation of the ideal of the rule of law is a necessary, not a sufficient, condition for our being obligated to comply with legal norms, even if a deep commitment to the ideal of the rule of law is assumed. A system might do a reasonably good job of exemplifying the elements of the rule of law and still be seriously defective from the standpoint of substantive principles of justice. For example, the system might be compatible with, or even promote, unjust economic inequalities, depending upon the content of the laws of property and the extent to which the current distribution of wealth is the result of past injustices. Similarly, the elements of the ideal might be satisfied, or at least closely approximated, in a system that failed to meet even the most minimal standards of democratic participation. The elements of the rule of law prevent certain kinds of injustices and help ensure the stability and predictability that rational agents need, but this is not to say that they capture the whole of justice. And if justice is to enjoy the kind of moral priority that is widely thought to be essential to the very notion of justice, then one cannot assume that illegal acts directed toward eliminating grave injustice in the system are always ruled out by fidelity to the ideal of the rule of law. Since many, indeed perhaps most, extant theories of justice include more than the requirements of the rule of law, it would be very misleading to assume that any illegal action for the sake of reforming the international legal system by making it more just must be the imposition of the reformer's subjective view of morality or merely personal views.

Nevertheless, a more subtle form of the moral authority issue remains: even if it is true that most or even all understandings of justice take it to include more than an approximation of the ideal of the rule of law, there is much disagreement about what justice requires, and it is appropriate to ask what makes it morally justifiable for an actor to try to impose on others the conception of justice she endorses. I take up the moral authority issue in Section IV.

Earlier I suggested that an approximate conception of the ideal of the rule of law would include the requirement of equality before the law. Some might disagree, limiting the ideal of the rule of law to the other elements listed above. If they are right then this is further confirmation that the rule of law is not the only value that is relevant to assessing the weight of our commitment to fidelity to law. For if equality before the law is not to be included in the ideal of the rule of law, then there is a strong

case for including it among the most basic and least controversial principles of justice, at least for those who value the role that law can play in securing justice. But if so, then whether it is morally permissible to violate a law to improve a legal system must surely depend in part on how unjust the system is.

The legitimacy of the international legal system.—The international legal system not only tolerates extreme economic inequalities among individuals and among states, it legitimizes and stabilizes them in manifold ways, not the least of which is by supporting state sovereignty over resources.[12] In addition, the international legal system is characterized by extreme political inequality among the primary members of the system (states). As already noted, a handful of powerful states wield a disproportionate influence over the creation and above all the application and enforcement of international law. Indeed, it is not implausible to argue that the extreme and morally arbitrary political inequality that characterizes the society of formally equal states robs the system of legitimacy. By a legitimate system I mean one whose institutional structures provide a framework within which its authorized actors are morally justified in making, applying, and enforcing laws.

To make a convincing case that these defects deprive the international legal system of legitimacy would require articulating and defending a theory of system legitimacy.[13] That task lies far beyond the scope of the present discussion. However, this much can be said: the more problematic a system's claim to legitimacy, the weaker the moral pull of fidelity to its laws, other things being equal. Neither Watson nor Rubin addresses the issue of whether illegal acts of reform may be justified if they hold a reasonable prospect of significantly improving the legitimacy of a system whose legitimacy is at the very least subject to doubt. However, we shall see later that there is a way of understanding their opposition to illegal reform as resting on a conception of system legitimacy that emphasizes adherence to the state consent supernorm, the principle that to be international law, a norm must enjoy the consent of states.

Given the existing international legal system's deficiencies from the

12. Henry Shue, *Basic Rights*, 2d ed. (Princeton, N.J.: Princeton University Press, 1980), pp. 131–52; Thomas Pogge, "An Egalitarian Law of Peoples," *Philosophy & Public Affairs* 23 (1994): 195–224.

13. There are two quite different conceptions of legitimacy that are often confused in the writings of political theorists. The first, weaker conception is that of being morally justified in attempting to exercise a monopoly on the enforcement (or the making and enforcement) of laws within a jurisdiction. The second, stronger conception, often called 'political authority', includes the weaker condition but in addition includes a correlative obligation to obey the entity said to be legitimate on the part of those over whom jurisdiction is exercised. I have argued elsewhere that it is the former conception, not the latter, that is relevant to discussions of state legitimacy in the international system. I would also argue that this is true for legitimacy of the system. Allen Buchanan, "Recognitional Legitimacy and the State System," *Philosophy & Public Affairs* 28 (1999): 46–78.

standpoint of what is either a cardinal element of the ideal of the rule of law or a basic, widely shared principle of justice, namely, equality before the law, and from the standpoint of a fairly wide range of principles of distributive justice, and given that the extreme political inequality among the states poses a serious challenge to the legitimacy of the system, it is implausible to assert that a commitment to the rule of law, as a moral ideal, rules out all illegal action for the sake of reform. The very defects of the system that provide the most obvious targets for reform weaken the moral pull of strict fidelity to its laws.

So far my analysis only shows that there is no simple inference from allegiance to the ideal of the rule of law to the moral unjustifiability of illegal acts directed to system reform. It does not follow, of course, that everything is morally permissible in a system as defective as the international legal system so long as it is done in the name of reform. An important question remains: given that a commitment to the ideal of the rule of law does not categorically prohibit illegal acts of reform, under what conditions are which sorts of illegal acts of reform morally justified? As a first approximation of an answer, we can say that, other things being equal, illegal acts are more readily justified if they have a reasonable prospect of contributing toward (*a*) bringing the system significantly closer to the ideal of the rule of law in its most fundamental elements, (*b*) rectifying the most serious substantive injustices supported by the system, or (*c*) ameliorating defects in the system that impugn its legitimacy.

The rule of law as necessary for avoiding violent chaos.—Our first interpretation of 'the rule of law' in the Fidelity Argument understood that phrase in a normatively demanding way: to be committed to the rule of law is to respect and endeavor to promote systems of rules that satisfy or seriously approximate a robust conception of the equality of law. We saw that on this interpretation the connection between being committed to the rule of law and refusing to violate existing international law is more tenuous and conditional than the critics of illegal reform assume. The second interpretation of 'the rule of law' as it occurs in the Fidelity Argument owes more to Hobbes than to Fuller. The idea is that even if international law falls far short of exemplifying some of the key elements of the ideal of the rule of law and even if it is seriously deficient from the standpoint of substantive justice and legitimacy, it is all that stands between us and violent chaos.[14] On this interpretation of the Fidelity Argument, we are presented with an austere choice: abstaining from illegal

14. Watson can perhaps be interpreted as endorsing this version of the Fidelity to Law Argument. He strongly emphasizes that international law will only be effective in constraining the behavior of states if it is consensual and rejects illegal acts of reform as being incompatible with the requirement of consent (Watson, pp. 265, 270, 275). The chief difficulty with this line of argument is that while it would be extremely implausible to say that

acts of reform or risking a Hobbesian war of each against all in international relations.

This is a false dilemma. As a sweeping generalization, the claim that illegal acts of reform run an unconscionable risk of violent anarchy is implausible. It would be more plausible if two assumptions were true: (*a*) the existence of the international order depends solely upon the efficacy of international law and (*b*) international law is a seamless web, so that cutting one fiber (violating one norm) will result in an unraveling of the entire fabric.

The first assumption is dubious. It probably overestimates the role of law by underestimating the contributions of political and economic relations and the various institutions of transnational civil society to peace and stability in international relations. But even if the first assumption were justified, the second, "seamless web" assumption is far fetched. History refutes it. As we have already noted, there have been illegal acts that were directed toward and that actually contributed to significant reforms, yet they did not result in a collapse of the international legal system.

Respect for the state consent supernorm.—Some critics of illegal reform, including Watson and Rubin, are especially troubled by the willingness of reformers to violate what these critics believe is an essential (constitutional) feature of the existing international legal system: the state consent supernorm, a secondary rule according to which law is to be made and changed only by the consent of states.[15] (As was noted earlier, the requirement of state consent here is understood in a very loose way to be satisfied either by ratification of treaties or through conformity to norms that achieve the status of customary law.) The question, then, is this: why is the state consent supernorm of such importance that illegal acts of reform that violate it are never morally justified? There appear to be three answers worth considering: (1) only if the state consent supernorm is strictly observed will violent chaos be avoided, because only state consent can render international law *effective*; (2) state consent is the only mechanism for creating effective norms of peaceful relations among states that is capable of conferring *legitimacy* upon international norms; or (3) the state consent supernorm ought to be strictly adhered to because doing so reduces the risk that stronger states will prey on weaker ones.

Thesis (1): The general claim that compliance with legal norms can

---

there must be perfect compliance with law for it to be effective, Watson does nothing to indicate either what level of compliance is needed for effectiveness or what counts as effectiveness.

15. Rubin, pp. 190–91, 205, 206; Watson, pp. 265, 270, 275.

only be achieved if those whose behavior is regulated by the norms consent to them is clearly false. In the case of domestic legal systems, virtually no one would assert that consent to every norm is necessary for effectiveness. So if the importance of consent is to supply a decisive reason against acts of reform that violate the state consent supernorm in international law, it must be because there is something special about the international arena that makes consent necessary if law is to be effective enough to avoid violent chaos.

If the Realist theory of international relations were correct, it would provide an answer to the question of what that something special is. According to the Realist theory, the structure of international relations precludes moral action except where it happens to be congruent with state interest. The importance of creating norms by state consent, on this view, is that it provides a way for states, understood as purely self-interested actors, to promote their shared long-term interests in peace and stability. Unless Realism is correct, it is hard to see why we should assume that consent is necessary for effective law in the international case, while acknowledging, as we must, that it is not necessary for effectiveness in domestic systems.

Realism has been vigorously attacked, most systematically by contributors to the Liberal theory of international relations. Because I believe these attacks are telling, I will not reenact now all too familiar argumentative battles between Realists and their critics. Instead, I will focus on the second and third versions of the argument that a proper appreciation of the consensual basis of existing international law precludes justifiable acts of illegal reform.[16]

Thesis (2): This is the view that what is morally attractive about the existing international legal system is not just that it avoids the Hobbesian abyss, but that it does so by relying upon the only mechanism for creating and changing norms of peaceful interaction that can confer legitimacy upon norms, given the character of international relations.[17] (A legitimate norm, here, is understood as one that it is morally justifiable to enforce.) The underlying assumption is that the members of the so-called community of states are moral strangers, that the state system is a mere association of distinct societies that do not share substantive ends

16. The literature exposing the deficiencies of the various forms of Realism in international relations is voluminous. Of particular value are Charles Beitz, *Political Theory and International Relations* (Princeton, N.J.: Princeton University Press, 1979), pp. 3–66; and writings of the liberal theory of international relations by Anne-Marie Slaughter, "International Law in a World of Liberal States," *European Journal of International Law* 6 (1995): 503–38; and Andrew Moravcsik, "Taking Preferences Seriously: A Liberal Theory of International Politics," *International Organization* 51 (1997): 513–53.

17. Terry Nardin, *Law, Morality, and the Relations of States* (Princeton, N.J.: Princeton University Press, 1983), pp. 5–13; John Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999), pp. 51–120.

of a conception of justice, rather than a genuine community.[18] In the absence of shared substantive ends or a common conception of justice, consent is the only basis of legitimacy for a system of norms. Within domestic societies, there are moral-political cultures that are "thick" enough to fund shared substantive ends or conceptions of justice and hence to provide a basis for legitimacy without consent; but not so in international "society." But if state consent is the only basis for legitimacy in the international system, then illegal acts of reform that violate the state consent supernorm, such as illegal interventions to support democracy or to prevent massive violations of human rights in ethnic conflicts within states, strike at the very foundation of international law and hence are not morally justifiable, at least for those who profess to be committed to reforming that system.[19]

The most obvious defect of this line of argument is that its contrast between international society as a collection of moral strangers and domestic society as an ethical community united by a "thick" culture of common values is overdrawn. Especially in liberal societies, which tolerate and even promote pluralism, whatever it is that legitimates the system of legal rules, it cannot be shared substantive ends or even a shared conception of justice. What Thesis 2 overlooks is that democratic politics in liberal domestic societies includes deliberation—and heated controversy—over which substantive ends to pursue, not simply over which means to use to pursue shared substantive ends. In particular, liberal domestic societies often contain deep divisions as to conceptions of distributive justice, with some citizens espousing "welfare-state" conceptions and others "minimal state" or libertarian conceptions. Yet such societies somehow manage to avoid violent chaos and also appear to be capable of having legal systems that are legitimate.

An advocate of Thesis 2 might respond, relying on Rawls's views in *Political Liberalism* and *The Law of Peoples,* that the members of liberal societies do share what might be called a core conception of justice—the idea that society is a cooperative venture among persons conceived as free and equal—but that there is no globally shared core conception of justice. Hence adherence to the state consent supernorm is necessary in international law, but not in domestic law.

There are three difficulties with this response. First, divisions within liberal domestic societies, especially concerning distributive justice, may be so deep that we must conclude either that (*a*) there is no shared core conception of justice or that (*b*) if there is it is so vague and elastic that it cannot serve as a foundation for a legitimate system of legal norms. (Even

18. Nardin acknowledges that states do share some ends, e.g., the flourishing international trade, but his view seems to be that what is distinctive about international law is that it binds together states in the absence of shared substantive ends.

19. Watson, p. 268.

if it is true that welfare state liberals and libertarians both hold that society is a cooperative endeavor among "free and equal" persons, their respective understandings of freedom and equality diverge sharply.) Second, and more important, even if it is, or once was, true, that value pluralism among states is much deeper than within them, there is evidence that this may be changing. As many commentators have stressed, international legal institutions, as well as the forces of economic globalization, have contributed to the development of a transnational civil society in which a culture of human rights is emerging. This culture of human rights is both founded on and serves to extend a shared conception of basic human interests and a conception of the minimal institutional arrangements needed to protect them.[20] Moreover, the canonical language of the major human rights documents indicates a tendency toward convergence that may be as good a candidate for a core shared conception of justice as that which Rawls attributes to liberal societies: the idea that human beings have an inherent equality and freedom. So even if it is true that a system of legal norms can be legitimate only if it is supported by a common culture of basic values or a shared core conception of justice, it is not clear that international society is so lacking in moral consensus that state consent must remain an indispensable condition if norms are to be legitimate.

There is a third, much more serious objection to the proposition that illegal acts of reform that violate the state consent supernorm are morally unjustifiable because they undermine the only basis for legitimacy in the international legal system: due to the very defects at which illegal acts of reform are directed, the normative force of state consent in the present system is morally questionable at best.

What is called state consent is really the consent of state leaders. But in the many states in which human rights are massively and routinely violated and where democratic institutions are lacking, state leaders cannot reasonably be regarded as agents of their people.[21] Where human rights are massively violated, individuals are prevented or deterred from participating in processes of representation, consultation, and deliberation that are necessary if state leaders are to function as agents of the people capable of exercising authority on their behalf.

But if state leaders are not agents of their peoples, then it cannot be said that state consent is binding because it expresses the people's will. How, then, can the consent of individuals who cannot reasonably be viewed as agents of the peoples they claim to represent confer legiti-

20. For a valuable exposition and defense of the idea of a global culture of human rights, see Rhoda E. Howard, *Human Rights and the Search for Community* (Boulder, Colo.: Westview, 1995), pp. 1–20.

21. Fernando Tesón, *The Philosophy of International Law* (Boulder, Colo.: Westview, 1998), pp. 39–41.

macy? Illegal acts directed toward creating the only conditions under which state consent could confer legitimacy cannot be ruled out as morally unjustifiable on the grounds that they violate the norm of state consent.

This is not to say that the requirement of state consent, under present conditions, is without benefit or that the benefits it brings are irrelevant to the question of whether the system is legitimate. It can be argued, as I have already suggested, that adherence to the state consent supernorm has considerable instrumental value, quite apart from the inability of state consent as such to confer legitimacy on norms. This is the point of the third thesis about the importance of the state consent requirement.

Thesis (3): This account of why the state consent supernorm is so important as to preclude illegal acts of reform that violate it is much more plausible than the first two. It does not assume that any violation of the norm of state consent poses an unacceptable risk of violent chaos, nor that state consent is supremely valuable because only it can achieve peace through norms that are legitimate. The proponent of Thesis 3 can cheerfully admit that law can be effective without consent and that under existing conditions state consent is in itself incapable of conferring legitimacy on the norms consented to. Instead, her point is that adherence to the state consent supernorm is so instrumentally valuable for reducing predation by stronger states upon weaker ones that it ought not to be violated even for the sake of system reform. Thesis 3 relies on the empirical prediction that if the international legal system fails to preserve the formal political equality of states by adhering to the state consent supernorm, the material inequalities among states will result in predatory behavior and in the violations of individual human rights as well as rights of self-determination which predation inevitably entails.[22]

It is no doubt true that the state consent supernorm provides valuable protection for weaker states. But even if this is so, it does not follow that acts of reform that violate the state consent supernorm are never morally justifiable. Acts of reform that are very likely to make a significant contribution to making the system more egalitarian—that contribute to increasing the substantive political equality of states, thereby reducing the risk of predation—may be morally justified under certain circumstances, even if they violate the state consent supernorm.

Another way to put this point is to note that the instrumental argument for strict adherence to the state consent supernorm is very much a creature of nonideal theory. At least from the standpoint of a wide range of theories of distributive justice, the existing global distribution of resources and goods is seriously unjust. But presumably these injustices

22. Benedict Kingsbury, "Sovereignty and Inequality," *European Journal of International Law* 9 (1998): 599–625.

play a major role in the inequalities of power among states. If the system became more distributively just, the inequalities of power that create opportunities for predation would diminish, and with them the threat of predation and the instrumental value of the state consent supernorm.

What this means is that there is nothing inconsistent in both appreciating the value of adherence to the state consent supernorm as a way of reducing predation and being willing to violate it in order to bring about systemic changes that will undercut the conditions for predation. The difficulty for the responsible reformer lies in determining when the prospects for actually achieving a significant reform in the direction of greater equality or justice are good enough to warrant undertaking an action that may have the effect of weakening what may be the best bulwark against predation the system presently possesses. While the instrumental (antipredation) argument may be powerful enough to create a strong presumption—for the time being—against violating the state consent supernorm, it is hard to see how it can provide a categorical prohibition on illegal acts of reform.

Furthermore, observing the state consent supernorm is not the only mechanism for reducing the risk of predation. The theory and practice of constitutionalism in domestic legal systems offer a variety of mechanisms for checking abuses of power. For example, a norm requiring that individual states or groups of states may intervene in domestic conflicts to protect human rights only when explicitly authorized to do so by a supermajority vote in the UN General Assembly would provide a valuable constraint on great power abuses.

The results of this section can now be briefly summarized. I have argued the notion of fidelity to law cannot provide a decisive reason for refraining from committing illegal acts directed toward reforming the international legal system. A sincere commitment to the ideal of the rule of law is not only consistent with illegal acts of reform; it may in some cases make such acts obligatory. Further, it is not plausible to argue that illegal acts of reform always constitute an unacceptable threat to peace and stability. Finally, I have argued that being willing to commit an illegal act of reform need not be inconsistent with a proper appreciation of the need to provide weaker states with protection against predation. I now turn to the other main challenge to illegal international legal reform: the charge that reformers wrongly impose their own personal or subjective views of morality upon others.

IV. MORAL AUTHORITY

The charge of subjectivism.—Opponents of illegal reform such as Watson and Rubin heap scathing criticism on those who would impose their own personal or subjective views of morality or justice on others. The suggestion is that those who endorse violations of international law, and especially those who disregard the state consent supernorm, are intolerant

ideologues who would deny to others the right to do what they do. It is a mistake, however, to assume as these critics apparently do, that the only alternatives are subjectivism or strict adherence to legality.

Internalist moral criticism of the system.—An agent who seeks to breach international law in order to initiate a process of bringing about a moral improvement in the system need not be appealing to a subjective or merely personal view about morality. Instead, she may be relying upon moral values that are already expressed in the system and, to the extent that the system is consensual, upon principles that are widely shared. In fact, it appears that some who were sympathetic to NATO's intervention in Kosovo, including UN Secretary General Kofi Annan, believed that this intervention was supported by one of the most morally defensible fundamental principles of the international legal system, the obligation to protect human rights, even though it was inconsistent with another principle of the system, the norm of sovereignty understood as prohibiting intervention in the domestic affairs of Serbia-Montenegro.[23] To describe those who supported the intervention by appealing to basic human rights principles internal to the system as ideologues relying on a merely personal or subjective moral view is wildly inaccurate.

Two views of moral authority.—Since the appearance of Rawls's book *Political Liberalism* there has been a complex and spirited debate about the nature of what I have called moral authority. Two main rival views have emerged. According to the first, which Rawls himself offers, moral authority, understood as the right to impose rules on others, is subject to a requirement of reasonableness. It is morally justifiable to impose on others only those principles that they could reasonably accept from the standpoint of their own comprehensive conceptions of the good or of justice, with the proviso that the latter fall within the range of the reasonable.[24] Rawls has a rather undemanding notion of what counts as a reasonable conception of the good or of justice: so long as the view is logically consistent or coherent and includes the idea that every person's good should count in the design of basic social institutions, it counts as reasonable. As I have argued elsewhere, Rawls's conception of moral authority counts as reasonable grossly inegalitarian societies, including those that include systematic, institutionalized racism or caste systems or systems that discriminate systematically against women.[25] The point is that on Rawls's view grossly and arbitrarily inegalitarian social systems

23. Kofi Annan, Speech to the General Assembly, September 20, 1999, p. 2 (September 20, 1999; SG/SM/7136 GA/9569: Secretary-G).

24. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), pp. 136–37.

25. Allen Buchanan, "Justice, Legitimacy, and Human Rights," in *The Idea of Political Liberalism*, ed. Victoria Davion and Clark Wolf (Lanham, Md.: Rowman & Littlefield, 2000), pp. 73–89.

count as reasonable because the requirement that everyone's good is to count is compatible with the good of some counting very little. To that extent, Rawls's conception of reasonableness is at odds with some aspects of existing international human rights law, including the right against discrimination on grounds of gender, religion, or race.

The root idea of the Rawlsian conception of moral authority is respect for persons' reasons in the light of what Rawls calls "the burdens of judgment." To acknowledge the burdens of judgment is to appreciate that due to a number of factors reasonable people can disagree on the principles of public order. Like Rubin and Watson, Rawls is concerned about those who assume that their belief that certain moral principles are valid is sufficient to give them the moral authority to impose those principles on others. In that sense, Rawls's reasonableness condition is an attempt to rule out the imposition of purely personal or subjective moral views.

However, Rawls's reasonableness criterion does not rule out imposing moral standards that others do not consent to. What people *can* reasonably accept, given their moral views, and what they actually *do* accept or consent to may differ. So, according to the Rawlsian conception of moral authority (or in his preferred term, legitimacy), acts of reform that violate the state consent supernorm are not necessarily unjustifiable, even if we slide over the problem of inferring the consent of persons from the consent of states.

Rawls's conception of moral authority focuses almost exclusively on one aspect of being reasonable, or of showing respect for the reasons of others: humility in the face of the burdens of judgment. Its only acknowledgment that reasons must be of a certain quality to warrant respect and toleration is the very weak requirement of logical consistency or coherence. A quite different conception of moral authority acknowledges the burdens of judgment and also affirms that part of what it is to respect persons is to respect them as beings who have their own views about what is good and right but places more emphasis on what might be called *epistemic responsibility* as an element of reasonableness.[26] According to this view, respect for persons' reasons does not require that we regard as reasonable any moral view that meets Rawls's rather minimal requirements of logical consistency or coherence and of taking everyone's good into account in some way. In addition, to be reasonable, and hence worthy of toleration, a moral view must be supportable by a justification that meets certain minimal standards of rationality. In other words, to be worthy of respect, moral views must be supported by reasons and reasoning that is

26. Thomas Christiano, "On Rawls's Argument for Toleration" (unpublished paper); Allen Buchanan, *Justice, Legitimacy, and Self-Determination: International Relations and the Rule of Law* (New York: Oxford University Press, forthcoming).

of a certain minimal quality that goes beyond logical consistency or coherence. In particular, it must be possible to provide a justification for a moral view that does not rely on grossly false empirical claims about human nature (or about the nature of blacks, or women, or "untouchables") and which does not involve clearly invalid inferences based on grossly faulty standards of evidence. The intuitive appeal of this more demanding conception of what sorts of views are entitled to toleration lies in the idea that respect for persons' reasons requires that those reasons meet certain minimal standards of rationality, the underlying idea being that it is respect for persons' reasoning, not their opinions, that matters. According to this conception of moral authority also, it is mistaken to assume that anyone who tries to reform the international legal system by performing acts that are violations of its existing norms is thereby imposing on others her purely personal or subjective moral views. The charge of subjectivity should be reserved for those views that do not meet the minimal standards of epistemic responsibility. Different versions of this view would propose different ways of fleshing out the idea that epistemic responsibility requires more than mere logical consistency or coherence.

My aim here is not to resolve the debate about what constitutes moral authority (though I have argued elsewhere that the epistemic responsibility view is superior to the Rawlsian view).[27] Instead, I have introduced two rival conceptions of moral authority, in order to show that both create a space between rigid adherence to existing consensual international law and the attempt to impose purely subjective, personal moral beliefs in violation of existing law. So even though it is correct to say that purely subjective or merely personal moral views cannot provide a moral justification for illegal acts of reform, it does not follow that anyone who breaks the law is merely acting on a subjective or personal view.

Watson and Rubin are quite correct to question the moral authority of proponents of illegal reform. Merely believing that one is right in itself is not a sufficient reason for doing much of anything, much less for violating the law or trying to initiate a process that will result in imposing laws on others without their consent. But they are mistaken to assume that those who advocate illegal acts of system reform must lack moral authority, and they offer no account of moral authority to show that illegal reformists must or typically will lack moral authority. In addition, as I have already argued, quite apart from whether either the Rawlsian conception of moral authority or the epistemic responsibility conception is correct, those who brand all proponents of illegal reform "subjectivists" entirely overlook the fact that in some cases, perhaps most, the reformer's

27. Buchanan, "Justice, Legitimacy, and Human Rights," and *Justice, Legitimacy and Self-Determination: International Relations and the Rule of Law.*

justification is internalist, appealing to widely shared moral principles already expressed in the system. It does not follow that these internal values of the system are beyond criticism, but they are not purely subjective or merely personal; instead, they are widely held, systematically institutionalized values. In appealing to the internal values of the system in order to justify an illegal act, the reformer is doing precisely what reformers (as opposed to revolutionaries) do: trying to see that the system does a better job of realizing the values it already embodies and is supposed to promote. The proper lesson to draw from Watson and Rubin's worries about moral subjectivism is that the justification of illegal acts of reform must rest upon a conception of moral authority, not that no justification can succeed.

V. TOWARD A THEORY OF THE MORALITY OF ILLEGAL LEGAL REFORM

Guidelines for determining the moral justifiability of illegal acts of reform.—In Section I, I located the problem of illegal reform in the part of nonideal normative theory of international law that deals with how we are to move toward the institutional arrangements prescribed by ideal theory. We are now in a position to articulate some of the key considerations that such a nonideal theory would have to include. My aim here is not to offer a developed, comprehensive theory of the morality of transition from the nonideal to the ideal situation but only to sketch some of its broader outlines so far as it addresses the problem of illegal acts of reform. To do this I will list a set of guidelines for assessing the morality of proposed illegal acts directed toward the moral improvement of the system.

The guidelines are derived from the preceding analysis of the objections to illegal acts of reform. While none of those objections rules out the moral justifiability of illegal acts of reform, they do supply significant cautionary considerations that a responsible agent would take into account in determining whether to engage in an illegal act aimed at reforming the system. Finally, I will clarify the import of the guidelines and demonstrate their power by applying them to the recent NATO intervention in Kosovo.

An important limitation of the guidelines should be emphasized: they are not designed to provide comprehensive conditions for the justification of intervention. Instead, they are to be applied to proposals for illegal interventions once the familiar and widely acknowledged conditions for justified intervention are already satisfied. Among the most important of these familiar conditions is the principle of proportionality, which requires that the intervention not produce as much or more harm (especially to the innocent) than the harm it seeks to prevent. Much of the criticism of NATO's intervention in Kosovo focuses on the failure to satisfy this requirement. My concern, however, is with the special justificatory issues raised by the illegality of an act of intervention that is un-

derstood as being directed toward system reform. To respond to these justificatory issues, I offer the following guidelines.

1. Other things being equal, the closer a system approximates the ideal of the rule of law (the better job it does of satisfying the more important requirements that constitute that ideal), the greater the burden of justification for illegal acts.
2. Other things being equal, the less seriously defective the system is from the standpoint of the most important requirements of substantive justice, the greater the burden of justification for illegal acts.
3. Other things being equal, the more closely the system approximates the conditions for being a legitimate system (i.e., the stronger the justification for attempts to achieve enforcement of the rules of the system), the greater the burden of justification for illegal acts.
4. Other things being equal, an illegal act that violates one of the most fundamental morally defensible principles of the system bears a greater burden of justification.
5. Other things being equal, the greater the improvement, the stronger the case for committing the illegal act that is directed toward bringing it about; and if the state of affairs the illegal act is intended to bring about would not be an improvement in the system, then the act cannot be justified as an act of reform.
6. Other things being equal, illegal acts that are likely to improve significantly the legitimacy of the system are more easily justified.
7. Other things being equal, illegal acts that are likely to improve the most basic dimensions of substantive justice in the system are more easily justified.
8. Other things being equal, illegal acts that are likely to contribute to making the system more consistent with its most morally defensible fundamental principles are more easily justified.

The rationale for the guidelines.—The basic rationale common to all the guidelines is straightforward. They provide a way of gauging (*a*) whether any given illegal act can accurately be described as being directed toward reform of the system and if so (*b*) whether committing it is compatible with a sincere commitment to bringing international relations under the rule of law. The guidelines articulate the considerations that an ideal agent who is committed to pursuing justice through legal institutions, but cognizant of the deficiencies of the existing system, would take into account in determining whether to commit or endorse an illegal act of legal reform. This characterization of such an agent is intended to be abstract, allowing for the fact that different agents may have different views about what justice requires. Thus the guidelines are intended to provide concrete guidance without presupposing a particular theory of justice.

Guideline 1 captures the idea that for those who are committed to

the rule of law, the fact that a system closely approximates that ideal provides a presumption in favor of compliance with its rules. Guideline 2 is a reminder that satisfying the formal requirements of the ideal of the rule of law is not sufficient for assessing the moral quality of a legal system and hence for determining the weight of the presumption that we ought to comply with its rules. In addition to satisfying or seriously approximating the ideal of the rule of law, a legal system ought to promote justice. The elements of the rule of law supply important constraints on the sorts of rules that may be employed in pursuit of the goal of substantive justice, but they are not the only factor relevant to assessing the moral quality of the system—how well the system promotes the goal of substantive justice also matters. In the case of the international legal system, it is relatively uncontroversial to say that the most widely accepted human rights norms constitute the core of substantive justice (to call this a subjective or purely personal view would be bizarre). To the extent that the protection of human rights is an internal goal of the international legal system, the appeal to substantive justice is an appropriate consideration in determining whether illegal action is morally justifiable and cannot be dismissed as the imposition of purely personal or subjective moral views.

Guideline 3 rests on the assumption that the conditions that make the system legitimate, including preeminently its capacity to promote substantive justice within the constraints of the ideal of the rule of law, give us moral reasons to support it and that consequently we should be more reluctant, other things being equal, to violate its rules if it scores well on the criteria of legitimacy.

Guideline 4 follows straightforwardly from the fundamental commitment to supporting the international legal system as an important instrument for achieving justice. The reformer, by definition, is someone who is striving to bring about a moral improvement in the system. Accordingly, she must consider not only the improvement that may be gained through an illegal act but also the need to preserve what is valuable in the system as it is.

Guideline 5 is commonsensical, stating that the justifiability of the illegal act of legal reform depends upon whether, and if so to what extent, the state of affairs the act is intended to bring would constitute an improvement in the system. In the case of an illegal act intended to help create a new customary norm, this means that the new norm must actually be an improvement over the status quo.

Guideline 6 acknowledges a fundamental tension in the enterprise of trying to develop a morally defensible system of law: on the one hand, a person who seeks to reform a legal system, qua reformer, values the indispensable contribution that law can make to protecting human rights and serving other worthy moral values; on the other hand, she appreciates that the enterprise of law involves the coercive imposition of rules

and that for this to be justified the system must meet certain moral standards. What this means is that the project of trying to develop the legal system to achieve the goal of justice must be accompanied by efforts to ensure that the system has the features needed to make the pursuit of justice through its processes morally justifiable. Thus guideline 6 acknowledges the distinction between justice and legitimacy and emphasizes that anyone who is committed to working within the system to improve it should take the legitimacy of the system itself as an important goal for reform.

Guideline 7, like guideline 3, emerges from my criticism of those opponents of illegal reform who make the mistake of thinking that conformity with the ideal of the rule of law is all we should ask of a legal system. There I argued that whether a legal system achieves or at least is compatible with the substantive requirement of justice is relevant to determining the system's moral pull toward compliance. My discussion of alternative views of moral authority showed that while Watson and Rubin are correct to condemn those who would attempt to impose subjective, that is, purely personal conceptions of substantive justice on the legal system, illegal reform for the sake of improving the substantive justice of the system is compatible with recognizing a requirement of moral authority and hence with acting from moral commitments that are not subjective in any damaging sense.

Guideline 8 is also intuitively plausible. A reformer who commits an illegal act that can reasonably be expected to make the system conform better to its own best principles is acting so as to *support* the system and to that extent the presumption against acting illegally that supporters of the system should acknowledge is weaker.

A word of caution is in order. The guidelines proceed on the assumption that content can be given to the idea of improving the system morally and they employ the notion of justice. However, they are not intended to provide a comprehensive moral theory nor to supply content for the notion of justice. They are designed to provide guidance for a responsible actor who both values the rule of law in international relations and is aware of both the system's need for improvement and the difficulties of achieving expeditious change by strictly legal means. It is inevitable that different agents may reach different conclusions about whether a particular illegal act directed toward system reform is morally justifiable, just as conscientious individuals can disagree as to whether a particular act of civil disobedience in a domestic system is morally justified. In some cases these different conclusions will be the result of different understandings of justice. But without having settled all disputes about what justice is, it is still possible to show that an actor sincerely committed to the rule of law in international relations, and who believes the existing system is worthy of efforts to reform it, can consistently perform or advocate illegal acts of reform. And it is possible to develop

guidelines for responsible choices regarding illegal acts of reform.

NATO intervention in Kosovo, a test case.—To cover a wide range of possible illegal acts of reform the guidelines must be abstract. To appreciate their value and to clarify their meaning I will apply them to NATO's intervention in Kosovo. I will assume that according to the preponderance of legal opinion, this was an illegal act. I noted in Section I that two quite different justifications were given for the intervention: the primary justification offered was that the intervention was morally justified (even if illegal) as the only means of preventing major violations of human rights; the other justification was that the intervention was a first step toward establishing a new, more enlightened customary norm of humanitarian intervention that allows intervention without Security Council authorization. My concern in this article is with the second justification, because it more clearly meets the description of an illegal act directed toward morally improving the system. How does this illegal act, justified in this way, fare with regard to the eight guidelines for assessing the moral justifiability of illegal acts of system reform?

It would be difficult to argue that guidelines 1, 2, or 3 weigh conclusively against NATO's intervention in Kosovo. As I have already noted, the existing system of international law departs seriously from the ideal of the rule of law, at least so far as this includes the principle of equality before the law, falls far short of satisfying substantive principles of justice, including those, such as human rights norms, that are internal to the system, and can be challenged on grounds of legitimacy because of the morally arbitrary way in which international law is often selectively applied in the interest of the stronger.

From the standpoint of guideline 4, the intervention in Kosovo initially looks problematic, simply because of the charge that its illegality consisted in the violation of one of the most fundamental principles of the system, the norm of sovereignty articulated in Articles 2(7) and 2(4) of the UN Charter, which forbid armed intervention except in cases of self-defense or the defense of other states, in cases of aggression.[28] However, guideline 4 refers to the most morally defensible fundamental norms. If the new customary norm of intervention that the illegal act is intended to help establish would in fact constitute a major improvement in the system, it would do so by restricting state sovereignty, and this implies that the norm of sovereignty in its current form is not fully defensible. In other words, the reformist rationale for acting in violation of the

28. For a valuable review of the evidence that current international law prohibits armed humanitarian intervention, even with Security Council authorization, see Lori Fisler Damrosch, "Changing Conceptions of Intervention in International Law," in *Emerging Norms of Justified Intervention* (a collection of essays from a project of the American Academy of Arts and Sciences), ed. Laura W. Reed and Carl Kaysen (Cambridge, Mass.: American Academy of Arts and Sciences, Committee on International Security Studies, 1993), pp. 93–110.

existing norm of sovereignty so as to help establish a new customary norm of intervention is that the existing norm of sovereignty creates a zone of protected behavior for states that is too expansive, at the expense of the protection of human rights. The more dubious is the moral defensibility of the principle of the system that the illegal act violates, the less force guideline 4 has as a barrier to illegal action. In cases where the establishment of a new norm through illegal action would constitute a major improvement *because* the existing norm that is violated is seriously defective, guideline 4 poses no barrier to illegal action. So whether guideline 4 counts for or against NATO's intervention in Kosovo depends upon whether the change the illegal act is aimed at producing would in fact be a major moral improvement in the system, which is addressed in guidelines 5–8.

Consider next guideline 5. Recall that the act in question is aimed at the establishment of a new customary norm and that the process by which new customary norms are created is a complex, multistaged one in which there are many opportunities for failure. Above all, it is important to remember that whether a new customary norm of intervention will arise will depend not just upon what NATO did in this case but upon whether a stable pattern of similar interventions comes about, upon whether states persistently dissent from the propriety of such interventions, and upon whether those who contribute to establishing a stable pattern of similar interventions do so in a way that satisfies the *opinio juris* requirement. Given these inherent uncertainties of the effort to bring about moral improvement through the creation of a new customary norm, an actor contemplating an illegal act of reform of this sort should be on very firm ground in judging that the new norm would in fact be a major improvement. In the next subsection I will argue that this condition was not met in the case of NATO's intervention in Kosovo.

It is tempting to assume that from the standpoint of substantive justice, the Kosovo intervention scores high because the establishment of a norm authorizing intervention into internal conflicts to prevent massive human rights violations would constitute a major improvement in the system. Moreover, the charge of subjectivism (lack of moral authority) rings hollow in this sort of case because, as Kofi Annan suggested, the protection of human rights is a core value that is internal to the system. However, whether or not the NATO intervention can be described as an act of illegal reform that would, if successful, bring about a major improvement in the system depends upon the precise character of the norm that this illegal act is likely to contribute to the establishment of—and upon whether a norm of this character would be likely to be abused.

What sort of new norm of customary law?— From the standpoint of its justifiability as an illegal act directed toward improving the system, just how the illegal act is characterized matters greatly. It is not sufficient to characterize the NATO intervention as an act directed toward establish-

ing a new norm of humanitarian intervention in domestic conflicts. Such a characterization misses both what makes the act illegal and what is supposed to make it an act directed toward improving the system by helping to establish a new norm of intervention: the fact that it was undertaken without UN authorization. Those who endorse the act, not simply as a morally justifiable act but as an act of reform calculated to contribute to the creation of a new norm, are committed to the assertion that the requirement of Security Council authorization is a defect in the system. And the fact that the intervention proceeded without Security Council authorization is the chief basis for the widely held view that the intervention was illegal.

For purposes of evaluating the justifiability of the NATO intervention as an illegal act directed toward reforming the system, then, the characterization of the act must at least include the fact that it occurred without Security Council authorization. But something else must be added to the characterization: the fact that the intervention was undertaken by a regional military alliance whose constitutional identity is that of pact for the defense of its members against aggression. Those who undertook the intervention and their supporters emphasized that it was conducted by NATO, presumably because they thought that this fact made the justification for it stronger than would have been the case had it been undertaken by a mere collection of states. Note that this appeal to the status of NATO as a regional defensive organization recognized by international law cannot refute the charge of illegality. According to Article 51 of the UN Charter, military action, including action by regional organizations as identified in Article 52, is permissible without Security Council authorization only in cases of the occurrence of armed attack against a state or a member of such an organization.[29] So the question remains: would a new customary norm permitting regional military organizations, or those that qualified as such under Article 52, be a moral improvement in the international legal system?

The answer to this question is almost certainly negative. A military alliance such as NATO is not the sort of entity that would be a plausible candidate for having a right under international law to intervene without UN authorization. The chief difficulty is that such a norm would be too liable to abuse. To appreciate this fact, suppose that China and Pakistan formed a regional security alliance and then appealed to the new norm of customary law whose creation NATO's intervention was supposed to initiate to justify intervening in Kashmir to stop Hindus from violating Muslims' rights in the part of that region controlled by India. It is one thing to say that NATO's intervention was morally justified as the only way of preventing massive human rights violations under conditions in

29. Barry E. Carter and Phillip R. Trimble, *International Law: Selected Documents* (Boston: Little, Brown, 1995), pp. 14–15.

which Security Council authorization was not obtainable. That justification for illegality makes no claims about the desirability of a new rule concerning intervention and is quite consistent with the view that despite its defects the rule requiring Security Council authorization is, all things considered, desirable under present conditions. The justification we are concerned with makes a stronger and much more dubious claim, namely, that the current rule requiring Security Council authorization ought to be abandoned and replaced with a new rule empowering regional defense alliances to engage in intervention at their discretion. Perhaps the current rule of intervention ought to be rejected, but it is very implausible to hold that adopting this new rule would be an improvement.

To conclude that the NATO intervention looks dubious from the standpoint of guidelines 5–8, then, is an understatement. The problem is not just that the change in customary law that the NATO intervention was supposed to contribute to is not a sufficiently important improvement to justify violating a fundamental norm of the system but that it is very doubtful that this change would be an improvement at all. In other words, the NATO intervention fails even to meet the threshold condition of being a plausible candidate for an illegal act of reform. So even if it scored better than it does on the other guidelines, the illegality of the act cannot be excused by appealing to the need to reform the system.

I conclude that the morality of the NATO intervention in Kosovo, understood as an illegal act directed toward improving the international legal system, is extremely doubtful. This criticism is valid independently of the cogency of the most widely publicized objection to the intervention, the charge that it violated the principle of proportionality that any intervention, legal or illegal, should satisfy because instead of stopping the ethnic cleansing of Albanians it actually accelerated it.

VI. CONCLUSIONS

My chief aim in this article has been to identify, and to begin the task of developing a solution for, an important but neglected problem in the nonideal part of normative theory of international law: the justification of illegal acts aimed at morally improving the system. I have also shown the inadequacy of a simple and common response to the problem—the charge that such acts are impermissible because they are inconsistent with a sincere commitment to the rule of law or betray a willingness to act without moral authority by imposing purely personal or subjective views of morality. By exploring the complex array of factors that are relevant to determining whether an illegal act of reform is morally justified, I hope to have vindicated the concerns of those such as Watson and Rubin that such illegalities bear a serious burden of justification, while at the same time showing that to reject illegal reform out of hand is to fail to appreciate the complexities of the issue. This seemingly narrow

inquiry has had a valuable result of much greater significance: facing the problem of the justification of illegal reform head-on, rather than pretending that reform efforts are legal by stretching the concept of legality, forces us to probe more deeply into the nature of the international legal system and the conditions for its legitimacy.